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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

FRANKLIN W. GUY ET AL.

vs.

JOHN A. DONALD.

BRIEF FOR GUY ET AL.

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(19,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

In Admiralty.

FRANKLIN W. GUY ET ALS., APPELLANTS,

vs.

JOHN A. DONALD, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLANTS.

This is a case of a libel *in personam,* instituted by John A. Donald *vs.* Franklin W. Guy and others, some twenty-six in number, jointly, who compose the Virginia Pilot Association, to recover damages alleged to have been sustained by the owners of the schooner *George Churchman,* arising from the collision between the steamer *Santuit,* of which the said John A. Donald is owner, and the *Churchman,* in the Chesapeake bay, near Thimble light, on the 14th day of January, 1901.

The respondent, Franklin W. Guy, as licensed Virginia pilot, was the pilot on board of the *Santuit* at the time of the

collision. It is claimed that the collision was the result of the negligence of the said Guy, and that he and his co-respondents, who compose the Virginia Pilot Association, are jointly responsible for damages to the said John A. Donald.

In the lower court two exceptions to the said libel were filed, one by the said Franklin W. Guy, severally, and the other by all of the said respondents, jointly and severally.

In the exception filed by himself severally to the said libel, the said Franklin W. Guy sets up as his defense the effect of this payment voluntarily and without suit, and without notice to him, of the damages now sought to be recovered against him by the said John A. Donald.

As to this exception we have nothing to say, for the reason that the certificate from the United States Circuit Court of Appeals for the Fourth Circuit submits for the consideration of this court only questions arising under the second exception filed in the lower court, which is the exception of Franklin W. Guy and others (viz, the other defendants, members of the Virginia Pilot Association), and raises the objection that there is no liability upon the other defendants for the negligent and unskillful acts of the said Franklin W. Guy, even if the allegations thereof in the said libel contained be in fact true.

We contend that there is no such copartnership between F. W. Guy and the other defendants as would in any sense render them liable for the action of the said Guy as pilot.

The pilot law of this State is contained in chapter 89 of the Code of Virginia, edition of 1887, sections 1955 to 1990, inclusive.

It will be seen from section 1957 that before a pilot can act as such he gives a bond in the penalty of $500, to be filed with the clerk of the corporation court.

Section 1963 of the Code provides a penalty for piloting vessels without authority, or employing unauthorized persons as pilot, fixing a penalty of $100 for so doing, to be paid by the master of a vessel to any regular pilot who shall sue for the same; so section 1964 provides that pilotage must be

paid to the pilot offering his services, and section 1965 that this pilotage must be paid to the *first* regular pilot who offers his services. Section 1969 fixes the compulsory rates of pilotage to be paid to pilots, sections 1970-75 fixing the respective amounts. Section 1976 distinctly sets out that the master of any such vessel, &c., shall be liable to the "first regularly licensed pilot" who "offers his services," and section 1978 is in part as follows:

"*Liability for Pilotage.*—The master and owner of any "vessel shall each be liable to the pilot for *his* pilotage and "other allowances, and also the consignee, or supercargo, of "any vessel not owned by a citizen of the State, shall deposit "with some responsible person, subject to the order of the "pilot, the amount of the pilotage due *him.*"

Section 1979 provides that pilots may state their accounts, verified by affidavit, and lodge them for collection with their agents, &c.

Section 1982 provides that "nothing herein shall author- "ize such board to decide upon the liability of a pilot, or his "apprentice, to any person injured by his negligence, or "misconduct, or to prevent such person from recovering for "any damage occasioned thereby."

And, further, we say, under the statutes made and provided as to pilots and pilotage, that in order to carry out the provisions of the same it is necessary to own vessels, employ men to man and navigate the same, have agents, and keep an office.

If any single pilot undertook to do this the expenses thereof would be largely in excess of any possible receipts he could make from his services; and thus it would be impossible, without co-operation between individual pilots, to give that aid and assistance to the commerce of the State which is absolutely necessary to the maintenance of our ports.

Thus it becomes necessary for the individual licensed pilots of the State, each having his own duty to the State and his own emoluments from his office as pilot, to jointly make

provision for the maintenance of such vessels and other appliances necessary to conduct the business and carry out the law which is intended to protect, foster and advance the commerce of the State, but without in any sense abrogating his individual rights and duties, as an officer of the State, under the law, which in terms makes the masters, owners, and consignees of vessels liable only to the *individual pilot* for the pilotage prescribed by the law; and *thus* makes the contract of pilotage with the individual pilot, and with him alone.

The law having thus put upon the individual pilot the *duty* to pilot the particular vessel, and upon the particular vessel the *duty* to employ the individual pilot, the law makes the contract between the individual pilot and the particular vessel—on the one hand to employ the pilot, and on the other to perform the piloting properly—and it seems to us that there is no such relation between the particular vessel and any other persons than the individual pilot as would give the vessel any claim against them for damages resulting from a violation by the individual pilot of the duties imposed upon him by the said contract.

Now, if it be claimed that the allegations of section "third" of the libel must be taken as true for the purpose of this argument, and that such allegations set out a case of combination of individuals in a common business, participating, in an agreed proportion, in the profits and losses of the common business, we still reply that this condition of facts does not, of *necessity*, create copartnership between the parties so participating in the business and the profits and losses of the same.

While for a long time in the history of our jurisprudence the participation in common loss and profits of a common business was one of the most conclusive tests of copartnership relations, yet the later and best opinion now is that this is not necessarily so.

The courts have come to the conclusion, as the result of an attrition of ideas, that the question of partnership or no part-

nership is not to be settled by arbitrary tests; that to attempt to do so is mischievous, resulting in error.

Beecher *vs.* Bush (1881), 45 Mich., 188, citing Meachem's Elements of Partnership, sec. 63, note *ubi supra,* sec. 68.

What, then, in the absence of conclusive tests, is the essential element of copartnership? "That the parties are mutually principals of and agents for each other."

Beecher *vs.* Bush, *ubi supra.*

Now, we contend that in the case of pilot associations the individual pilots are not, and under our statutes cannot be, each the agents of the other members.

Our entire system of statutes on this subject show that the individual pilots are quasi-public officers; they derive their authority not from the association, but from the State; their service is personal, and in its performance they represent only themselves, individually, with a responsibility only to the State; their right to compensation is given to them individually by statute, as officers of the State; their fees are fixed by statute, as the fees of other State officers are; and there can be no copartnership in State officers.

Sec. 18, Meachem on Elements of Partnership.

If we are correct in our contention that no copartnership can exist between persons holding a public office or invested with a personal trust, then we submit that the provisions of the statutes of 1775 and 1792, cited by the plaintiff's counsel, do not affect the proposition for which we contend, because in this view of the case those statutes are enabling statutes, authorizing pilots, if not more than two or four in number, to form a copartnership.

When, therefore, these enabling provisions were omitted from the Code of 1849, the result was to leave the law as it was before these statutes were passed. The question, there-

fore, works back to the original inquiry, whether, independent of the statutes, pilots have a right to form a copartnership. We have sought to show that they have not.

If, therefore, the parties who are sought to be held as partners cannot, under the law, occupy the relation each of principal for himself and agent for his associates (because each renders only a personal service), no *presumption* of copartnership, arising from the participation in the profits of the concern, can exist, because the relation of partnership *inter sese* cannot *legally* exist between them.

Our contention, therefore, is that these pilots are quasi-public officers, or at least invested with a personal trust; that, this being so, they cannot occupy the relation of principals for themselves and agents for their associates (without which, a copartnership cannot exist), for, under the principles of the common law, it is against public policy for a copartnership to exist in public offices.

> Jones *vs.* Perchard, 2 Esp., 507; Canfield *vs.* Hard, 6 Conn., 180; See Gaston *vs.* Drake, 1 Nev., 175; Seely *vs.* Back, 42 Mo., 143; Bowen *vs.* Richardson, 133 Mass., 293; Gould *vs.* Kendall, 15 Neb., 549; Warner *vs.* Griswold, 8 Wend., 665; Wolcott *vs.* Gibson, 51 Ill., 69.

Second. The fact that the State imposes a "personal" obligation to perform the duty of pilotage affects the legality of such a partnership, in that it makes them public officers, and so renders it impossible to form a legal partnership.

It is the personal element which distinguishes the case of the pilot from that cited of railroad company or common carrier. A corporation cannot, from the nature of things, be a public officer; hence the cases are not analogous.

Third. The pilot association pleads no wrong in its defense, since it denies the existence of the partnership and cites the illegality only to show that, had it desired, it could

not have formed one. Had it claimed to be an "illegal partnership," then its illegality might not have been set up.

Fourth. If a court may take judicial cognizance of the statute laws of the State, our contention is that they may also take cognizance of the rules and regulations of a body created by those statutes, by them invested with the power of making rules and regulations supplementary to the provisions of the statutes.

This is the position in the statute law of the land occupied by the rules and regulations of the board of pilot commissioners.

We call especial attention to the case of the *City of Dundee* (103 Fed., 696) and the same case affirmed upon appeal (108 Fed. Rep., 679), in which the exact question involved here arose, and in the same way, upon the Pennsylvania pilot laws, which are identical with ours in the fact (as stated in its opinions) that the individual pilots formed themselves into an "incorporated" association, *inter sese*, for "the management of its pilot-boats and the division of the moneys received from its members to their respective shares, as set forth in its rules," where it was held that there was no copartnership.

See also Mason *vs.* Ervine, 27 Fed. Rep., 459.

Respectfully submitted,

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